No. 12,735

United States Court of Appeals

For the Ninth Circuit

H. L. JONES, individually and doing business under the style and trade name of STANDARD SEED FARMS COMPANY,

Appellant,

vs.

THE BARTELDES SEED COMPANY (a corporation),

Appellee.

APPELLANT'S CLOSING BRIEF.

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THE EFFECT OF THE NON-WARRANTY CLAUSE.

The appellee throughout his brief contends that the non-warranty clause as shown in the surplus list, plaintiff's exhibit No. 7, was never referred to in the conversation which resulted in the formation of the contract which is the subject of this action; that there is no evidence in the record that it was ever read by appellee; and that the non-warranty did not become a part of the contract.

The facts, themselves, contradict this contention. The facts on page 49 of the transcript of the record

reveal that Mr. Stubbs described the surplus list as follows: "It quoted numerous items which they offered *subject to being unsold,* which included two thousand (2,000) pounds of Yellow Globe Danvers onion seed." He states that he telephoned Mr. Jones on October 20th, 1943, immediately upon the receipt of the list. When asked to state fully what was said in the conversation Mr. Stubbs replied "I told him (Jones) that we had his surplus list, and that we would purchase *the* two thousand (2,000) pounds of Yellow Globe Danvers onion seed at $2.50 per pound which he quoted in the list at $3.00 a pound."

This contract arose when the Barteldes Seed Company received the surplus list offering certain onion seeds for sale.

Mr. Stubbs recalled that the items were offered subject to being unsold which was a term set forth in the surplus list, yet the appellee claims he did not notice the non-warranty clause. It is quite obvious that Mr. Stubbs read the surplus list and noted the provision that the seeds were offered subject to being unsold and he offered to buy *the* two thousand (2,000) pounds of Yellow Globe Danvers onion seed that were offered in the surplus list under the terms of the surplus list. With these facts it is difficult for the appellant to concede the fact that the disclaimer clause was not called to the attention of Mr. Stubbs, since it was plainly printed on the surplus list from which he ordered the seed. It is more difficult to understand the appellee's contention that the disclaimer clause as

shown in the surplus list was not brought to the buyer's attention, when we consider the fact that as shown in plaintiff's exhibit No. 6, that the Barteldes Seed Company had printed on its own letter-head that "the Barteldes Seed Company gives no warranty, expressed or implied, as to purity, description, quality, productiveness or any other matter of any seeds, bulbs or plants they send out and will not be in any way responsible for the crop." On page 107 of the Record, Armin Barteldes testified that he thought he knew the general custom in the seed business until the Dutch Valley case (the adverse decision to the Barteldes Seed Company denying the validity of the seedmen's disclaimer clause) came on. He readily admitted that in October, 1943, that the Barteldes Seed Company used the general seedmen's disclaimer as shown on the letter-head of the Barteldes Seed Company in plaintiff's exhibit No. 6.

The courts dealing with the non-warranty or disclaimer clause have had this argument brought before them that the purchaser was not aware of the non-warranty provisions in the offer of sale.

The case of *Ross v. Northrup* (1914), 156 Wis. 327, 144 N.W. 1124, 160 A.L.R. 361, having the same contention before it, stated:

> "The business was transacted by mail. Where the book from which the order was given, the shipping tag and the invoice all stated these conditions, it would be unreasonable to hold that any blame attached to the defendant if Morton (plaintiff) failed to observe all of these things.

> Mr. Morton could not close his eyes to the information that was literally staring him in the face then hold the defendant liable."

The case of *Davis v. The Bertrand Seed Company* (1928) in 94 Cal. App. 281, 271 P. 123, also had this contention. The facts of the case, and letter offering the seed for sale, had printed upon it the general non-warranty clause "that while we exercise great care to have our seeds pure and reliable, we give no warranty, expressed or implied, as to description, quality, productiveness, or any other matter of any seeds we send out, and we will be in no way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned."

The *Davis* case held on the authority of the *Miller v. Germain Seed* case, 193 Cal. 62 (1924), 222 Pac. 817, 32 A.L.R., 1215, that:

> "In the case cited (Miller case) as already indicated sofar as the rights between the parties are concerned it was found there was no writing, printed or otherwise, between the parties disclaiming expressed or implied warranty that the seeds were of the variety known as 'Golden Yellow Celery, California.' "
>
> "But the Court held that the above instructions (that if there was a general custom of non-warranty the plaintiff would be bound thereby, even if he did not know of such custom and usage) should have been given so that the jury if they so found could, as against a *farmer* purchasing

seed for use, nullify the foregoing 'expressed or implied warranty', by a mere custom unknown to the buyer himself. *And we emphasize the following portion of the opinion* (Italics ours):

'And by a parity of reasoning which lead the Court to arrive at the foregoing conclusion, it would seem to follow that as between *two sophisticated wholesale seed corporations,* an express disclaimer of warranty inserted in their mutual correspondence should have even greater potency as to disclaimer or warranty than the seed seller's custom which bound the farmer in the Miller-Germain case.' ''

To what extent a buyer must go in order to ascertain the existence of a disclaimer or warranty clause is brought out in the case of *Henry v. Salisbury,* (1897) 14 App. Div. 526, 43 N.Y.S. 851, where the fact that a catalogue was called supplemental was sufficient to charge the buyer with knowledge of the contents of the preceding or main catalogue in which the non-warranty clause was printed, the Court held:

''That to hold defendant liable we must first be able to point to a warranty in his behalf. The statement as to the age of May Day (a horse) contained in the supplemental catalogue and relied upon as stating a warranty in this case cannot properly be treated as such, because of the notice contained in the preceding catalogue, to the effect that the age of the horse was not guaranteed. The ignorance of that notice, if ignorance existed on the part of the purchaser, cannot be allowed to turn the statement in the supplement

> into a warranty. It was plainly his own fault if he did not ascertain what the principal catalogue said in regard to the ages of the animals to be sold."

When we analyze the facts in our case and the law above quoted, our logical conclusion is that the appellee knew, or should have known, and was put on notice as to the non-warranty provision in the offer to sell. The mere fact that the contract was made orally by telephone would not abrogate or destroy the foregoing non-warranty clause and make into a warranty words that were merely set forth giving the seller's opinion in good faith as to the type and description of the seeds which he had for sale.

ABSENCE OF EXPRESS WARRANTY.

The appellee in his brief frequently stated that an express warranty was made, that the seeds sold were true to type. Let us first examine the record to see on what facts this assertion is based.

The only testimony upon which this assertion could be based is that of W. P. Stubbs on page 50 of the transcript of record. His testimony there was "I told him at the time we wanted first class quality stocks of high germination and true to type and he assured me that the stock were of *first class quality* and of *high germination.*" He testified, on page 50 of the record, that there was nothing said about limitation or liability nor was there anything said about non-war-

ranty. He stated there was nothing said about the possibility of the seed not being Yellow Globe Danvers. This is the entire testimony in the record upon which appellee can base an expressed warranty that the onion seed shipped was expressly warranted to have the characteristics of Yellow Globe Danvers.

The California Civil Code in Section 1732 defines an express warranty as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty".

The facts in this case show that there was no express warranty. The Court in its Findings of Fact on page 32 of the transcript of record found that "it is impossible by examination, inspection or otherwise to recognize or identify the variety or type of any onion from the seed thereof. The variety and type can be determined only from the sets of matured onions after the seed is planted and grown". There is no doubt that the appellee, a wholesale dealer in seeds for many years, knew that the variety of onion seed could not be determined from the observation of the seed itself, and that the only way that the variety of onion could be determined would be to plant the seed and wait until the seed matured into an onion. They also knew that

when Mr. Jones told them that he had two thousand (2,000) pounds of Yellow Globe Danvers onion seed that Mr. Jones himself could not determine from an inspection of the seed that it was Yellow Globe Danvers onion seed, and that at most his statement was merely his opinion as to the variety of onion which the seed would produce, and he did not and could not confirm the fact that the seed would mature into Yellow Globe Danvers onion. The appellee contends that the assertion by Mr. Stubbs that he told Mr. Jones he wanted only first-class quality stock of first class germination and true to type, and that Jones assured him that the stocks were first class quality and of *high germination* that the words used were an express warranty of *description* of the seeds on its face is absurd. Mr. Jones did not even mention the word "description" nor did he mention the fact that the seeds would be true to type. Nothing was said about warranty or non-warranty, and nothing was said about the fact that the Yellow Globe Danvers onion seed might not in reality have the characteristics of Yellow Globe Danvers. In the case of *Belt Seed Company v. Mitchelhill Seed Company* (1941) in 238 Mo. App. 142, 153 S.W. (2d) 106, it was held that the statement "ger. 80" was not an express warranty that the germination of the seed would be 80%, but it was held that the quoted words were merely an expression of an opinion and not a warranty in view of the express disclaimer of warranty as to description, quality, productiveness, or any other matter printed in the first

paragraph of the communication of sale and other written communication passing between the parties.

As shown in the appellant's opening brief the case of *William A. Davis v. Bertrand Seed Company* (1928) 94 Cal. App. 281, 271 Pac. 123, showed that the statements such as these are not incompatible with the non-warranty clause and they reconcile the two,

> "The language relied upon should be and can be construed in the reasonable sense which will preserve and not do violence to the plain meaning of the expressed language of the non-warranty clause; and be construed merely in connection with the statement touching care in selection and expressive of an opinion in good faith as to the general merits of the defendant's stock in trade."

It is unreasonable to assume that a corporation which itself relies upon a non-warranty clause would accept these words as constituting an express warranty when they could have exacted their terms and conditions in the making of a contract which would have made an express warranty.

CUSTOM AND USAGE IN THE SEED TRADE.

The appellant contends that upon reading the testimony of H. L. Jones, Cyrus Voorhies and James Hamilton that there was a custom and usage in the seed business to use non-warranty clause.

The appellant realizes that about the time of the sale of the seed in question the seedmen were using two different types of non-warranty clauses and this had brought much confusion into the testimony of Jones, Voorhies and Hamilton. But whether or not the exact non-warranty clause was known by these witnesses at the time of the sale in question, they all testified there was some type of non-warranty clause in existence. They all agreed that the seller of the seeds would not expose himself to full and complete liability in the sale of seeds. We have constantly maintained that there was a custom and usage in the seed business not to warrant or to accept full responsibility in the sale of seeds. This has been disputed by the appellee, but even the appellee's own witness, Armin Barteldes, on page 108 of the transcript of record was confused as to non-warranty clause which was in existence and stated that his company, the appellee, used the non-warranty clause as shown in plaintiff's exhibit No. 6, in which they expressly denied any responsibility for the mis-description of the seeds. The custom and usage is brought out not to contradict the expressed terms of the contract but to establish what the parties had in mind when the contract was made.

> "A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed, for the reason that the majority of such transactions are had in view of the custom, and the agreement on which

the minds of the parties actually met will thereby be carried into effect. * * * Where the custom is proved to be known to both, it may even add terms to the contract. * * * Where the custom is *general* it will be presumed to have entered into the contract, and one may be bound thereby although ignorant, unless the other party be shown to have knowledge of his ignorance. * * *"

Miller v. Germain Seed Company, supra;

Ross v. Northrup, supra.

On page 84 of the transcript of record appellant, H. L. Jones testified that the usual seedmen's disclaimer was that they give no warranty as regards purity, productiveness, or any other matter connected with the sale of seeds and that they would not be responsible for the product.

On page 96 of the record Cyrus F. Voorhies testified that the custom was that you do not guarantee the productiveness of the seed sold, the productiveness and the other *varieties,* type, et cetera.

On page 105 of the transcript of the record James Hamilton testified: "The old disclaimer was the one where there was germination, *variety,* and so forth and so on. * * *"

Nowhere in the entire record is there any testimony that it was not the custom and usage of the seedmen not to warrant or that any seedmen did accept full responsibility for the seeds they sold.

As this is the only testimony given on the disclaimer clause the appellant contends that there are no facts whatsoever that the Court could base its findings that

there was no custom and usage in the seed business not to warrant the sale of seed. Findings of Fact No. IX on page 27 of the record.

The trial Court expressed the opinion that there is no rationale to the non-warranty clause. He bases his reasoning as is shown on page 27 of the transcript of record on an ambiguous answer to a compound question.

The custom and usage as testified to by Cyrus F. Voorhies on page 96 of the record was in existence throughout the United States "before my time." Armin Barteldes on page 108 of the transcript of record also testified it was the general custom in the seed business *not to warrant.*

The appellant feels that the trial Court did not have before it enough evidence to call a universal custom of one of the largest industries in the United States that has been in existence many years irrational. The Supreme Court of the State of Utah has this to say about the rationality and the practical aspects of the seedmen not to warrant:

> "As shown by the cases, the so-called disclaimer of warranty which seedmen variously print on containers, tags, and cards placed in the packets is a matter of importance in a transaction involving the sale of seed. The risks and dangers that threaten a crop between the planting and the harvesting are numerous. If the seed merchant could not protect himself by custom not to warrant or by a disclaimer of warranty, he would find it hard to survive the litigation that would come to his door. The purchase price of a parcel

of seed is usually insignificant as compared with the value of the crop that may be raised therefrom. For this small price the seed merchant may feel that he cannot afford to warrant."

REFUTATION OF APPELLEE'S AUTHORITY.

The appellee contends that the law of the State of Colorado should govern the performance of this contract and as his authority cites the case of *Puritas Coffee and Tea Company v. De Martini, et al,* 56 Cal. App. 628, 206 Pac. 96, at page 98, a case decided in 1922, prior to the adoption of the Uniform Sales Act. We have discussed this in our opening brief, starting on page 7. He then relies upon the authority of the *Rocky Mountain Seed Co. v. Knorr* (1933), 92 Colo. 320, 20 P. (2d) 304. This case has been distinguished by the authorities. The case of *Kennedy v. Cornhusker Hybrid Co.* (1946), 146 Neb. 230, 19 N.W. (2d) 51, 160 A.L.R. 351, held:

> "Plaintiff's case is not comparable with those where a party purchased *timothy* and was delivered *millet,* or purchased *alfalfa* and was delivered *sweet clover,* or, as stated by plaintiff, purchased a *cow* and was delivered a *horse.* Cases cited by plaintiff in support of his contention are obviously distinguishable and have no application to the case at bar. The distinction is clearly demonstrated by a statement which appears in one of the cases relied upon by plaintiff. In Rocky Mountain Seed Co., v. Knorr, 92 Colo. 320, 20 Pac. (2d) 304, 305, it was said: 'It will be observed that defendant's (buyer's) contention is

not that the delivery was short in quantity, or was lacking in productiveness, or was an inferior kind of alfalfa, or that the crop failed, but rather that on a purchase of alfalfa seed plaintiff made delivery of sweet clover seed. * * *' And that is the distinction which the authorities recognized."

CONCLUSION.

Under the conclusion the appellant respectfully submits to this Court that the trial Court erred in not finding that the disclaimer clause as set forth in appellant's surplus list, plaintiff's exhibit No. 7, expressly negatived any expressed or implied warranty in the description, purity, productiveness, or any other matter of the seeds sold.

That the Court erred in not finding that the custom and usage in the seed business became an integral part of this contract, and was in the minds of the parties when the contract was confirmed and negatived any expressed or implied warranty as to the description, purity, productiveness or any other matter of the seeds sold.

Dated, Stockton, California,
May 14, 1951.

Respectfully submitted,
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